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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS, TINA M. FOSTER, GITANJALI S. GUTIERREZ, SEEMA AHMAD, MARIA LAHOOD and RACHEL MEEROPOL,	**Case No. 06-cv-313**
Plaintiffs,	**Judge Gerard E. Lynch**
v.	**Magistrate Judge Kevin N. Fox**
GEORGE W. BUSH, President of the United States; NATIONAL SECURITY AGENCY, Lieutenant General Keith B. Alexander, Director; DEFENSE INTELLIGENCE AGENCY, Lieutenant General Michael D. Maples, Director; CENTRAL INTELLIGENCE AGENCY, Porter J. Goss, Director; DEPARTMENT OF HOMELAND SECURITY, Michael Chertoff, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller III, Director; and JOHN D. NEFROPONTE Director of National Intelligence,	**ECF CASE**
Defendants.	

MEMORANDUM OF LAW OF CERTAIN MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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List of Amici

The following members of Congress, through undersigned counsel, respectfully submit this memorandum of law in support of Plaintiff's Motion for Partial Summary Judgment:

1. John Conyers, Jr. of Michigan
2. Neil Abercrombie of Hawaii
3. Gary Ackerman of New York
4. Brian Baird of Washington
5. Tammy Baldwin of Wisconsin
6. Howard Berman of California
7. Shelley Berkley of Nevada
8. Earl Blumenauer of Oregon
9. Rick Boucher of Virginia
10. Corrine Brown of Florida
11. Michael Capuano of Massachusetts
12. Julia Carson of Indiana
13. William Lacy Clay of Missouri
14. Artur Davis of Alabama
15. Peter DeFazio of Oregon
16. Diana DeGette of Colorado
17. William Delahunt of Massachusetts
18. Sam Farr of California
19. Chaka Fattah of Pennsylvania

20. Barney Frank of Massachusetts
21. Al Green of Texas
22. Raul Grijalva of Arizona
23. Maurice Hinchey of New York
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36. Carolyn Maloney of New York
37. Edward Markey of Massachusetts
38. Jim McDermott of Washington
39. James McGovern of Massachusetts
40. Martin Meehan of Massachusetts
41. George Miller of California
42. James Moran of Virginia
43. Jerrold Nadler of New York
44. Eleanor Holmes Norton of District of Columbia
45. James Oberstar of Minnesota
46. John Olver of Massachusetts
47. Major Owens of New York
48. Donald Payne of New Jersey
49. Charles Rangel of New York
50. Linda Sanchez of California
51. Bernard Sanders of Vermont

52. Janice Schakowsky of Illinois
53. Bobby Scott of Virginia
54. Jose Serrano of New York
55. Brad Sherman of California
56. Louise Slaughter of New York
57. Hilda Solis of California
58. Fortney Pete Stark of California
59. Bennie Thompson of Mississippi
60. John Tierney of Massachusetts
61. Tom Udall of New Mexico
62. Chris Van Hollen of Maryland
63. Debbie Wasserman Shultz of Florida
64. Melvin Watt of North Carolina
65. Maxine Waters of California
66. Diane Watson of California
67. Henry Waxman of California
68. Robert Wexler of Florida
69. Lynn Woolsey of California
70. Albert Russell Wynn of Maryland
71. Stephanie Tubbs Jones of Ohio
72. David Wu of Oregon

I. INTEREST OF AMICI CURIAE

Congress enacted the Foreign Intelligence Surveillance Act of 1978 ("FISA"), Pub. L. 95-511, Title I, 92 Stat. 1796 (Oct. 25, 1978) in order to eliminate any ambiguity as to the Executive Branch's prerogative to engage in warrantless wiretapping of Americans for national security purposes. FISA delineates carefully calibrated, balanced requirements for applying for judicial permission to engage in such activity, and creates a judicial entity – the "FISA Court" – to rule expeditiously on such requests from the Executive Branch.

There has been an insufficient showing that the mechanisms created by FISA could not have been effectively utilized by the Executive Branch to pursue domestic electronic wiretapping in the post September 11 environment. In fact, the FISA court has rejected only four out of over 18,000 applications since its creation in 1978. Nonetheless, it appears that the President, essentially by Executive Branch fiat, has directed the National Security Agency to ignore the law by engaging in wiretapping of American citizens without a FISA or other warrant obtained from the Judicial Branch. Amici, members of Congress elected by our fellow citizens to enact legislation that binds all Americans, including the President of the United States, respectfully submit that this Court should grant plaintiffs' motion for partial summary judgment, thereby rendering a judicial finding that the NSA's activity in this regard is contrary to duly enacted congressional legislation as well as the Constitution of the United States.

We emphasize that we fully support the efforts of our government generally to gather information concerning terrorist groups and to seek, by all legitimate means, to interdict their efforts to attack Americans. We say only that insofar as the NSA's program of electronic surveillance directed at Americans is concerned, there is a mechanism created by legislation enacted by Congress and signed by the President that delineates procedures whereby such activities may be initiated and maintained. No one – no President or other citizen – is above the law. Accordingly, we support the efforts of Plaintiffs to ensure that such legislation is faithfully enforced.

II. THE NSA's DOMESTIC SURVEILLANCE PROGRAM

The New York Times disclosed the NSA's domestic surveillance program on December 16, 2005.[1] The next day, the President publicly acknowledged he had "authorized the National Security Agency . . . to intercept the international communications of people with known links to al Qaeda and related terrorist organizations,"[2] and the Attorney General acknowledged that the NSA surveillance is the "kind" that ordinarily "requires a court order before engaging in" it.[3] The NSA's program evidently includes both telephonic and internet communications by Americans. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment ("Pls.' Mem.") at 5-6.

This disclosure raised an obvious conflict with both the Foreign Intelligence Surveillance Act ("FISA"), which applies to the "interception of international wire communications *to or from*

[1] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

[2] President George W. Bush, President's Radio Address (Dec. 17, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html.

[3] Attorney General Alberto Gonzales and Principal Deputy Director for National Intelligence General Michael Hayden, Press Briefing (Dec. 19, 2005), *available at* www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

any person (whether or not a U.S. person) within the United States with out the consent of at least one party,"[4] and the Fourth Amendment. [5]

Government sources have stated that "the NSA eavesdrops without warrants on up to 500 people in the United States at any given time."[6] Some reports indicated that the total number of people monitored domestically has reached into the thousands, while others have indicated that significantly more people have been spied upon.[7]

Attorney General Gonzales has asserted that pursuant to the program, the NSA intercepts the contents of communications where there is a "reasonable basis to believe" that a party to the communication is "a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda or working in support of al Qaeda."[8] General Hayden, the Principal Deputy Director for National Intelligence, has stated that the judgment of whether to target a communication is made by operational personnel at the NSA using the information available to them at the time,[9] and that judgment is made by two people, signed off only by a shift supervisor.[10] Because the judgement is made "without the burden of obtaining warrants," General Hayden conceded that the NSA Program has used a "quicker trigger" and "a subtly softer trigger" when it decides to target someone than is required to be made under FISA.[11]

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[4]Elizabeth B. Bazan and Jennifer K. Elsea, Legislative Attorneys, *American Law Division, Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information,* Congressional Research Service Memorandum (January 5, 2006), at 44 (emphasis added) [hereinafter CRS Memo] [Exhibit A hereto]

[5]The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[6]James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. James Risen's sources recounted in *The New York Times*, "roughly 500 people in the United States" were eavesdropped on "every day over the past three to four years." *MSNBC.com*: Interview by Andrea Mitchell with James Risen, (Jan. 3, 2006), *available at* http://www.msnbc.msn.com/it/10697484/page/4/print/1/displaymode/1098/. *The Washington Post* has reported that "[t]wo knowledgeable sources placed that number in the thousands, one of them, more specific, said about 5,000." Barton Gellman, Dafna Linzer, & Carol D. Leonnig, *Surveillance Net Yields Few Suspects; NSA's Hunt for Terrorists Scrutinizes Thousands of Americans, but Most Are Later Cleared*, WASH. POST, Feb. 5, 2006, at A01.

[7]Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Trove, Officials Report,* N.Y. TIMES, Dec. 23, 2005, at A1.

III. THE HISTORY AND SIGNIFICANCE OF FISA

In 1976, the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("the Church Committee") issued a report, the culmination of an extensive congressional investigation. The Church Committee report documented how the NSA and other intelligence agencies had engaged in extensive warrantless surveillance of Americans, and explained how the Executive's use of broad labels like "national security" and "subversion" in identifying targets exponentially increased warrantless surveillance:

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[8] Attorney General Alberto Gonzales and Principal Deputy Director for National Intelligence General Michael Hayden, Press Briefing (Dec. 19, 2005), *available at* www.whitehouse.gov/news/releases/2005/12/20051219-1.html. Various members of the Administration, including the president, have omitted the Attorney General's caveats at various times, asserting, for example, that the only communications being intercepted were "communications, back and forth, from within the United States to overseas with members of Al Qaeda." *Id.*

[9] General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html.

[10] *Id.*

[11] Charlie Savage, *Wiretaps Said to Sift All Overseas Contacts Vast US Effort Seen on Eavesdropping,* THE BOSTON GLOBE, Dec. 23, 2005, at A1.

> The application of vague and elastic standards for wiretapping and bugging has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated. . . . The inherently intrusive nature of electronic surveillance . . . enabled the Government to generate vast amounts of information – unrelated to any legitimate governmental interest – about the personal and political lives of American citizens. The collection of this type of information has, in turn, raised the danger of its use for partisan political and other improper ends by senior administration officials.

Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans (Book III), S. Rep. No. 94-755, at 332 (1976) ("Church Committee Book III"). Warrantless surveillance, moreover, continued for decades without any basis to justify it. *Id.* at 5 (Surveillance of "groups deemed potentially dangerous," as well as those groups merely "suspected of associating with [them,] continued for decades, despite the fact that those groups did not engage in unlawful activity."). As the Church Committee concluded, unchecked surveillance activity inevitably "exceed[s] the restraints on the exercise of governmental power which are imposed by our country's Constitution, laws, and traditions." Church Committee Book II, *supra*, at 2.

The Church Committee concluded that "[t]he Constitutional system of checks and balances ha[d] not adequately controlled intelligence activities." Church Committee Book II, *supra*, at 6. Congress, it explained, had "failed to exercise sufficient oversight," while the courts had been reluctant to grapple with the few cases that came before them. *Id.*; *see also id.* at 15 (describing "clear and sustained failure . . . to control the intelligence community and to ensure its accountability"). The Church Committee's message could not have been starker or its warning clearer: if "new and tighter controls" were not established, "domestic intelligence agencies threaten[ed] to undermine our democratic society and fundamentally alter its nature." *Id.* at 1. The Committee, accordingly, urged Congress to enact legislation restricting surveillance by the NSA and other intelligence agencies to prevent repeated intrusions on Americans' privacy and speech rights, intrusions which jeopardized their ability to engage in constitutionally protected civil rights activity and meaningful public debate. Specifically, it recommended that the NSA be limited by "a precisely drawn legislative charter" prohibiting the agency from "select[ing] for monitoring any communication to, from, or about an American" unless "a warrant approving such monitoring is obtained in accordance with procedures similar to those contained [under the federal wiretapping statute]." *Id.* at 309. The NSA retained "wide discretion for selecting not only the communication channels to be monitored, but also what information was disseminated." Church Committee Book III, *supra*, at 761. While NSA spying had ceased in 1973, the Committee recognized that the agency could resume illegal activity "at any time upon order of the Executive" if Congress did not establish specific legislative controls. *Id.*

Accordingly, in 1978, Congress enacted the Foreign Intelligence Surveillance Act of 1978 ("FISA"), Pub. L. 95-511, Title I, 92 Stat. 1796 (Oct. 25, 1978), prohibiting electronic surveillance of Americans for national security purposes except pursuant to carefully calibrated statutory protections. FISA was enacted in direct response to the Church Committee's "revelations that warrantless electronic surveillance in the name of national security ha[d] been seriously abused." S. Rep. No. 95-604 (I), at 7-8, reprinted in 1978 U.S.C.C.A.N. 3904, 3908-09;

see also United States v. Belfield, 692 F.2d 141, 145 (D.C. Cir. 1982) (FISA enacted in response to "concerns about the Executive's use of warrantless electronic surveillance" and "establish[ed] a regularized procedure for use in the foreign intelligence and counterintelligence field"). Congress intended FISA to restore and preserve Americans' confidence in their ability to engage in the "public activ[ity]" and "dissent from official policy" at the heart of civil rights advocacy and meaningful public debate. S. Rep. No. 95-604 (I), at 8, 1978 U.S.C.C.A.N. at 3909-10; *cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). In enacting FISA, Congress struck a balance between liberty and security, authorizing the Executive to conduct electronic surveillance of Americans to obtain foreign intelligence information but subjecting that surveillance to explicit statutory controls to preserve constitutional freedoms. S. Rep. No. 95-604 (I), at 8, 1978 U.S.C.C.A.N. at 3906. FISA thus demonstrates "a recognition by both the Executive Branch and the Congress that the statutory rule of law must prevail in the area of foreign intelligence surveillance." *Id.* at 6, 1978 U.S.C.C.A.N. at 3908.

Specifically, FISA requires that the Executive obtain a warrant based upon probable cause that the electronic surveillance target is a foreign power or agent of a foreign power. 50 U.S.C. § 1805(a)(3); *see also* S. Rep. No. 95-604 (I), at 6, 1978 U.S.C.C.A.N. at 3908 (FISA "spell[ed] out that the Executive cannot engage in electronic surveillance within the United States without a prior Judicial warrant"). FISA, together with Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), provide "the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). FISA states that no one may engage in electronic surveillance "except as authorized by statute," 50 U.S.C. § 1809(a)(1), and to further deter warrantless surveillance, FISA and Title III impose civil and criminal sanctions against those who conduct such surveillance without statutory authority, *id.* §§ 1809, 1810; 18 U.S.C. §§ 2511, 2520. FISA was specifically "designed . . . to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Rep. No. 95-604(I), at 8-9, 1978 U.S.C.C.A.N. at 3910.

IV. SUMMARY OF ARGUMENT

The Bush Administration has laid out a number of arguments to defend the domestic spying program – first they claim that the program does not violate FISA because the September 11 Use of Force Resolution authorized the surveillance program; second, they argue that the program falls within the President's inherent authority as Commander-in-Chief; and third they claim that the Fourth Amendment warrant requirement does not apply to the program. A review of the legislative history of FISA and the Use of Force Resolution, as well as applicable Constitutional interpretations and case law establishes that these arguments are not legally sustainable. Of particular note, on January 5, 2006, Elizabeth B. Bazan and Jennifer K. Elsea, Legislative Attorneys, American Law Division of the non-partisan Congressional Research Service have prepared a 44-page Memorandum entitled, "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information," which we hereby attach as Exhibit A, which details a number of flaws and concerns regarding the Department of Justice's legal position in this case.[12]

V. ARGUMENT

A. FISA IS THE LAW AND IT MUST BE FOLLOWED.

The Administration has propounded four separate legal justifications to justify the proposition that the so-called Authorization for the Use of Military Force ("AUMF")[13] authorizes warrantless surveillance within the United States. First, the Administration highlights a provision in the AUMF preamble that reads, [the attacks of September 11th] "render it both necessary and appropriate that the United States exercise its right to self-defense and to protect United States citizens both at home and abroad."[14] US Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described By the President* (Jan. 19, 2006), at 12 [*hereinafter* White Paper]. Second, the Administration relies on a Supreme Court decision, *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), in which in upholding the Non-Detention Act the Court noted that the AUMF "clearly and unmistakably authorize[s]" the "fundamental incident[s] of waging war." White Paper at 2. Third, the Administration points to Section 109 of

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[12]CRS Memo.

[13]The operative provision of the AUMF provides "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224(2)(a) (2001).

[14]In emphasizing the "at home" language, the Administration explains, "[t]o take action against those linked to the September 11th attacks involves taking action against individuals within the United States."

FISA which "makes it unlawful to conduct electronic surveillance, 'except as authorized by statute'"[15] and argues that the AUMF provides such explicit statutory authority.[16] Fourth, the Administration argues that the canon of constitutional avoidance requires resolving conflicts between FISA's proscriptions and executive branch authority in favor of the President. White Paper at 28.

We respectfully submit that the overwhelming weight of legal authority contravenes each and every one of these assertions. First, with regard to the claims that the AUMF resolution directly authorized warrantless surveillance in the U.S., Tom Daschle, the Senate Majority Leader at the time the AUMF was enacted has stated the Senate rejected a last minute request from the White House that the AUMF authorize "all necessary and appropriate force in the United States and against those nations, organizations or persons [the President] determines planned, authorized, committed or aided" the attacks of Sept. 11th.[17] Senator Daschle explains that "this last-minute change would have given the president broad authority to exercise expansive powers not just overseas – where we all understood he wanted authority to act – but right here in the United States, potentially against American citizens."[18]

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[15]Letter from the Honorable William E. Moschella, Assistant Attorney General, to the Honorable Pat Roberts, Chairman, Senate Select Committee on Intelligence, the Honorable John D. Rockefeller, IV, Vice Chairman, Senate Select Committee on Intelligence, the Honorable Peter Hoekstra, Chairman, Permanent Select Committee on Intelligence, and the Honorable Jane Harman, Ranking Minority Member, Permanent Select Committee on Intelligence (Dec. 22, 2005).

[16]*Id.*

[17]Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, at A21.

[18]*Id.*

Republican Senator Sam Brownback (R-KS) has concurred with Senator Daschle, stating, "I do not agree with the legal basis on which [the Administration] are basing their surveillance – that when the Congress gave the authorization to go to war that gives sufficient legal basis for the surveillance."[19] Senate Judiciary Chairman Arlen Specter (R-PA) has stated that "I do not think that any fair, realistic reading of the September 14 resolution gives you the power to conduct electronic surveillance,"[20] while Senator Lindsey Graham (R-SC) declared, "I will be the first to say when I voted for it, I never envisioned that I was giving to this President or any other President the ability to go around FISA carte blanche."[21] Senator John McCain (R-AZ) has stated, "I think it's probably clear we didn't know we were voting for [domestic warrantless surveillance]."[22] Significantly, the nonpartisan Congressional Research Service has concluded that based on their review of the law, "it appears unlikely that a court would hold that Congress has expressly or impliedly authorized the NSA electronic surveillance operations here under discussion."[23]

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[19]Scott Rothschild, Senator: *Bush's Spying Raises Serious Concerns*, LAWRENCE JOURNAL-WORLD, Dec. 24, 2005, *available at* http://www2.ljworld.com/news/2005/dec/24/senator_bushs_spying_raises_concerns/?city_local.

[20]*Wartime Executive Power and the NSA's Surveillance Authority (Part I): Hearing before the Senate Judiciary Committee*, 109th Cong., 186 (2006) (Sen. Arlen Specter, Chairman, Senate Judiciary Committee).

[21]*Wartime Executive Power and the NSA's Surveillance Authority (Part I): Hearing before the Senate Judiciary Committee*, 109th Cong., 84 (2006) (Sen. Lindsey Graham, member, Senate Judiciary Committee).

[22]Susan Page, *Bush's Defense of Domestic Spying Meets Skepticism*, USA TODAY, Dec. 21, 2005, at 6A.

[23]CRS Memo at 44.

Moreover, it is difficult for the Administration to credibly claim that the AUMF authorizes warrantless wiretapping, when they have also acknowledged that Congress was not supportive of such a proposal.[24] On December 19, 2005, Attorney General Gonzales stated that "[w]e have had discussions with Congress in the past [after the 9/11 attacks] – certain members of Congress – as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that would be difficult, if not impossible."[25] The Administration's tepid response in this area – they have admitted they never even bothered to inquire about the possibility of amending FISA with Members on the Judiciary Committee which has jurisdiction over FISA[26] – may in part be due to the fact that according to government sources the Administration "only more recently added the force resolution argument as a legal justification."[27] Second, the Administration's contention that the *Hamdi* decision supports the proposition that the AUMF authorizes the President to engage in warrantless surveillance is contradicted by the fact that the majority of the Court found that Mr. Hamdi has a right to due process and that the U.S. was not permitted to detain him for an indefinite period of time, writing, "indefinite detention for the purpose of interrogation [of enemy combatants] ... is not authorized."[28] 542 US 507, 521 (2004). In addition, the *Hamdi* decision itself is limited to operations abroad and to enemy combatants of the United States. 542 U.S. 507, 516 (2004). By contrast, the domestic surveillance program applies in the U.S. to U.S. citizens who have not been shown to have done anything harmful to the U.S. As Professor Tribe notes, it is therefore difficult to argue that *Hamdi* supports the idea of warrantless surveillance of Americans, when they "are not even *alleged* to be enemies, much less *enemy combatants*."[29]

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[24]Indeed, it would be odd if the AUMF was to be interpreted as giving the Administration greater legal authority than an actual declaration of war, as under FISA, war time warrantless surveillance is limited to 15 days. 50 U.S.C. § 1811 (1978).

[25]Attorney General Alberto Gonzales and Principal Deputy Director for National Intelligence General Michael Hayden, Press Briefing (Dec. 19, 2005), *available at* www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

[26]When asked at the Senate Judiciary Committee whether the Administration raised the idea of amending FISA with any Members of the Committee, Attorney General Gonzales responded, "I have no personal knowledge that anyone on this Committee was told." *Wartime Executive Power and the NSA's Surveillance Authority (Part I): Hearing before the Senate Judiciary Committee*, 109th Cong., 111 (2006) (testimony of Attorney General Alberto Gonzales).

[27]Charles Babington & Dan Eggen, *Gonzales Seeks to Clarify Testimony on Spying*, WASH. POST, Mar. 1, 2006, at A08. In addition, in 2003, when a draft "PATRIOT II" bill, which would have among other things, changed current law authorizing wartime warrantless surveillance for up to 15 days without court approval, to "allow the wartime exception to be invoked after Congress authorizes the use of military force, or after the United States has suffered an attack creating a national emergency," the Bush Administration dropped the proposal amidst a storm of criticism. *See* Sandy Bergo, *Draft Legislation Undercuts Bush Domestic Spying*

Rationale, The Center for Public Integrity Report, Jan. 31, 2006. Dan Eggen, *2003 Draft Legislation covered Eavesdropping*, WASH. POST, Jan. 28, 2006 at A2. In June 2002, Senator Dewine, offered legislation that would have permitted "reasonable suspicion" rather than "probable cause" to serve as the standard for obtaining surveillance warrants for non-US citizens believed to be connected to terrorism (S. 2659, 107th Cong. (2002),. however, the Bush Administration objected, asserting the proposal raised "both significant legal and practical issues." *Hearing on Proposals to Amend the Foreign Intelligence Surveillance Act of 1978, Before the S. Select Comm. on Intelligence*, 107th Cong. (2002) (testimony of James A. Baker).

[28]"With respect to *Hamdi*, the Bush Administration also cited a 2004 Harvard Law Review article which they claim supported their interpretation of the case: "'*the clear inference is that the AUMF authorizes what the laws of war permit.*' Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2048, 2092 (2005) (emphasis added)." White Paper at 13. However, the author of the piece, Curtis A. Bradley, has stated that the quotes "were taken out of the context of a larger discussion." and "I don't know of anything in the laws of war that contemplates this sort of surveillance." Eric Lichtblau and Adam Liptak, *Bush and His Senior Aids Press On in Legal Defense for Wiretapping Program*, WASH. POST, Jan. 28, 2006, at A1.

[29]Letter from Laurence H. Tribe, Carl M. Loeb University Professor, Harvard University Law School, to The Honorable John Conyers, Jr. (Jan. 6, 2006) at 4 (emphasis in original). The Bush Administration's contention on this point is also undercut by a legal memorandum prepared by 14 legal experts and former government officials, including President Reagan's FBI Director,

Third, in its White Paper, the Administration goes to great pains to claim that FISA contemplated exceptions to it, and that those who dispute their interpretations are somehow arguing that one Congress can bind a future Congress. White Paper at 22. Clearly, one Congress cannot bind a future Congress, however that is not in dispute. The problem with the Bush Administration's arguments is that when Congress enacted FISA in 1978, it went to great lengths to state that FISA was the definitive word concerning electronic surveillance, and the only exceptions to that law were some "technical activities," such as so-called "trap and trace" monitoring, and that it was intended that any future exemptions should be clear and specific, not vague and general as is the case with the Administration's AUMF assertion. As the House Committee explained in legislative history, FISA "carries forward the criminal provisions of chapter 119 [of Title 18, U.S.C.] and makes it a criminal offense for officers or employees of the United States to intentionally engage in electronic surveillance under color of law except as specifically authorized in chapter 119 of title III [of the Omnibus Crime Control and Safe Streets Act of 1968] and this title [concerning pen register activities]. H. CONF. REP. 95-1720, at 33. In reviewing this legislative history, the Congressional Research Service observed, "[t]hus, the

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William S. Sessions and prominent conservative legal scholar, William Van Alstyne which concludes, "[i]t is one thing, however, to say that foreign battlefield capture of enemy combatants is an incident of waging war that Congress intended to authorize. It is another matter entirely to treat unchecked, warrantless domestic spying as included in that authorization, especially where an existing statute specifies that other laws are the 'exclusive means' by which electronic surveillance may be conducted." Letter from Beth Nolan, Curtis Bradley, David Cole, Geoffrey Stone, Harold Hongju Koh, Kathleen M. Sullivan, Laurence H. Tribe, Martin Lederman, Philip B. Heymann, Richard Epstein, Ronald Dworkin, Walter Dellinger, William S. Sessions, and William Van Alstyne to Members of Congress (Jan. 9, 2005). The Congressional Research Service has written a 44-page memorandum contradicting the Bush Administration's legal justifications for the domestic spying program, concluding, among other things, "[t]here is reason, however, to limit *Hamdi* to actual military operations on the battlefield as that concept is traditionally understood." CRS Memo at 34.

legislative history appears to reflect an intention that the phrase "authorized by statute" was a reference to chapter 119 of Title 18 of the U.S. Code (Title III) and to FISA itself, rather than having a broader meaning, in which case a clear indication of Congress's intent to amend or repeal it might be necessary before a court would interpret a later statute as superceding it."[30]

While FISA certainly is subject to amendment, it would seem clear that the AUMF does not come close to meeting the standards of precision contemplated by Congress.[31] In the present case, not only did the AUMF not explicitly amend FISA as Congress intended, it is not even clear the AUMF constitutes a "statute" within the meaning of FISA. As Professor Turley explained in the House Briefing, "the Force Resolution is not a statute for the purpose of Section 1809 [of FISA]." *Democratic Briefing on the "Constitution in Crisis: Domestic Surveillance and Executive Power," Before the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Prof. Jonathan Turley).[32]

The Department's fourth assertion, that the cannon of constitutional avoidance should lead to an implicit statutory repeal of FISA is also not legally sustainable. The case law holds such repeals by implication can only be established only by "overwhelming evidence" – which is clearly not the case with regard to the NSA program. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-142 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)) held that "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable;" while in *United States v. Oakland Cannabis Buyers Corp.*, 532 U.S. 483, 494 (2001), the Supreme Court has held that "the canon of constitutional avoidance has no applications in the absence of statutory ambiguity." The interpretational rule which does apply in the present case is the doctrine that specific statutes prevail over general statutes when there is a possible conflict, as set forth in cases such as *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992). Accordingly, as Judge Sessions and other legal scholars explained, "[c]onstruing FISA and the AUMF according to their plain meanings raises no serious constitutional questions regarding the President's duties under Article II. "Construing the AUMF to permit unchecked warrantless wiretapping without probable cause, however, would raise serious questions under the Fourth Amendment."[33]

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[30]CRS Memo at 40.

[31]In the White Paper, the Bush Administration was somewhat dismissive of clear congressional intent, noting ""some Members of Congress believed that any such authorization would come in the form of a particularized amendment to FISA itself... ." White Paper at 26. The Administration failed to note that "some Members" came in the form of the Committee Report filed by the House Intelligence Committee, which was most responsible for writing the legislation.

[32]The Congressional Research Service also concluded, "[a]lthough section 109(a) of FISA does not explicitly limit the language "as authorized by statute" to refer only to Title III and to FISA, the legislative history suggests that such a result was intended." CRS Memo at 43.

As an alternative to its statutory authority argument, the Administration also claims it has authority to conduct domestic warrantless surveillance by virtue of the President's "inherent" constitutional authority as Commander-in-Chief.[34] The Department of Justice has developed three rationales to support this claim. First, the Administration asserts the founding fathers intended that the executive branch be “clothed with all the powers requisite” to protect the Nation, White Paper at 7, and compares the current executive surveillance program to the intelligence methods of President George Washington, who intercepted mail between Britain and Americans in the revolutionary war; President Woodrow Wilson, who in WWI intercepted cable communication between the U.S. and Europe; and President Franklin Roosevelt, who intercepted mail after the bombing of Pearl Harbor.[35] Second, the Administration relies on Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer,* to argue that the President’s wartime authority to act is at its “zenith” with respect to warrantless surveillance.” 343 U.S. 579 (1952); *see* White Paper at 7. Third, the Administration repeatedly cites a passage in the *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Serv. Ct. Rev. 2002), that “[w]e take for granted that the President does have [inherent wiretap authority] and, assuming that it is so, FISA could not encroach on the President’s constitutional power,” which case in turn refers to three circuit court decisions: *United States v. Truong Dinh Hung,* 629 F.2d 908 (4[th] Cir. 1980), *United States v. Butenko*,494 F.2d 593 (3rd Cir. 1974), *cert. denied sub nom. Ivanov v. United States*, 419 U.S. 881 (1974), and *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973). *See* White Paper at 8.

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[33]Letter from Beth Nolan, Curtis Bradley, David Cole, Geoffrey Stone, Harold Hongju Koh, Kathleen M. Sullivan, Laurence H. Tribe, Martin Lederman, Philip B. Heymann, Richard Epstein, Ronald Dworkin, Walter Dellinger, William S. Sessions, and William Van Alstyne to Members of Congress (Jan. 9, 2005).

[34]US Attorney General Alberto Gonzales, Prepared Remarks for Attorney General Alberto R. Gonzales at the Georgetown University Law Center, (Jan. 24, 2006), *available at* http://www/usdoj.gov/ag/speeches/2006/ag_speech_0601241.html. It is instructive to note that the Administration did not point to the warrantless wiretapping engaged in by the Nixon Administration or their efforts to rely on inherent executive authority, however the Supreme Court did reject President Nixon's assertion of such authority to enjoin the publication of the

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Pentagon Papers. *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

[35]Attorney General Alberto Gonzales remarks (Jan 24, 2006), *available at* http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601241.html. It is instructive to note that the Administration did not point to the warrantless wiretapping engaged in by the Nixon Administration or their efforts to rely on inherent executive authority, however the Supreme Court did rejected President Nixon’s assertion of such authority to enjoin the publication of the Pentagon Papers. *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

The Administration's contention that the intent of the founding fathers supports their inherent authority argument belies any viable understanding of the founding of the United States. It was founding father Benjamin Franklin who declared, "[t]hey that can give up essential liberty to purchase a little temporary safety, deserve neither liberty not safety,"[36] and it was James Madison who warned that wartime is "the true nurse of executive aggrandizement."[37] A close review of Federalist 23 reveals that it argues for a strong federal government, not a strong executive.[38] Moreover, in Federalist 47, Madison further warned about the dangers of excess of power in the executive, writing, "[t]here can be no liberty where the legislative and executive powers are united in the same person," or "if the power of judging be not separated from the legislative and executive powers." THE FEDERALIST No. 47 (James Madison). If the Administration truly appreciated history, it would recognize that the founding fathers provided for a Fourth Amendment with a strong warrant requirement in reaction to colonists well-founded the fears regarding the British "general warrant" of the 1700's, under which the British authority, "could break into any shop or place suspected of containing evidence of potential enemies of the state." *Wartime Executive Power and the NSA's Surveillance Authority (Part II): Hearing before*

[36] BENJAMIN FRANKLIN, PENNSYLVANIA ASSEMBLY: REPLY TO THE GOVERNOR (Nov. 11, 1755), *reprinted in* THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree, ed., Yale Univ. Press) (1963).

[37] JAMES MADISON, LETTERS OF HELVIDIUS, no. 1 (Aug. 24 - Sept. 14, 1793).

[38] Federalist 23 states, "[t]he necessity of the Constitution, at least equally energetic with the one proposed, to the preservation of the Union, is the point at the examination of which we are now arrived ... . Its distribution and organization will more properly claim our attention under the succeeding head." THE FEDERALIST No. 23 (Alexander Hamilton).

the Senate Judiciary Committee, 109th Cong. (2006) (testimony of Harold Hongju Koh, Dean, Yale Law School).

The argument that warrantless surveillance has been going on since as early as General George Washington does not appear to be legally or constitutionally credible. Not only did some of the "precedents" cited by the Administration occur before the Constitution, Bill of Rights, or Fourth Amendment was in place, but the cited actions by President Woodrow Wilson and Franklin Roosevelt occurred before the Supreme Court held in 1967 that the Fourth Amendment applies to electronic surveillance, *Katz v. United States*, 389 U.S. 347 (1967), before FISA was enacted in 1978, and before Congress repealed a provision of law deferring to the President with respect to foreign intelligence information. 50 U.S.C. §§ 1801 *et. seq.*

The Administration's contention that the *Youngstown Steel* decision supports the claim of inherent authority is also legally tenuous. The holding of *Youngstown Steel* rejected the idea that President Truman had inherent presidential authority to seize steel mills during the Korean military conflict, with the Supreme Court finding that such important questions as the authority to seize private property "is a job for the Nation's lawmakers, not for its military authorities." *Democratic Briefing on the "Constitution in Crisis: Domestic Surveillance and Executive Power," Before the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Prof. Jonathan Turley). Properly understood, the *Youngstown Steel* case severely undermines, rather than supports the Administration's contentions. In his critical concurring opinion, Justice Jackson explained that "the presidential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress," 343 U.S. 579, 635 (1952), and that when the President defies "the expressed or implied will of Congress," his authority is "at its lowest ebb" and "Presidential power [is] most vulnerable to attack and in the least favorable of possible constitutional postures." 343 U.S. at 637-640.[39]

B. LEGISLATIVE HISTORY OF FISA

In the present case, there appears to be little doubt that the warrantless surveillance program is operating against the express as well as the implied will of Congress, and that the President is therefore at his "lowest ebb" in terms of constitutional authority. The legislative history of FISA makes it abundantly clear that Congress intended to and indeed did "express its will" and "occupy the field" with respect to the area of surveillance impacting Americans.[40] Thus, when Congress approved FISA in 1978, it refused to provide an exception to enable the President to conduct warrantless surveillance involving Americans[41] and, as noted above, explicitly repealed the provision which the executive branch had previously relied upon in claiming inherent presidential authority for warrantless surveillance.[42]

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[39]*See* Letter from Beth Nolan, Curtis Bradley, David Cole, Geoffrey Stone, Harold Hongju Koh, Kathleen M. Sullivan, Laurence H. Tribe, Martin Lederman, Philip B. Heymann, Richard Epstein, Ronald Dworkin, Walter Dellinger, William S. Sessions, and William Van Alstyne to Members of Congress (Jan. 9, 2005). As Justice Frankfurter articulated, "[i]t is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is . . . to disrespect the whole legislative process and the constitutional division of authority between President and Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952).

[40]As Professor Tribe observed, "an unchecked presidential program of secretly recording the conversations of perhaps thousands of innocent private citizens in the United States in hopes of gathering intelligence potentially useful for the ongoing war on a global terrorist network not only falls outside that category but misses it by a mile." Letter from Laurence H. Tribe, Carl M. Loeb University Professor, Harvard University Law School, to The Honorable John Conyers, Jr. (Jan. 6, 2006).

[41]Congress refused to enact language proposed by the Ford administration that: "[n]othing contained in this chapter shall limit the constitutional power of the President to order electronic

The legislative history from the House, Senate, and Conference Report also supports this view. The House Report provides, "[E]ven if the President has the inherent authority in the absence of legislation to authorize warrantless electronic surveillance for foreign intelligence purposes, *Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted*." H.R. Rep. No. 95-1283, pt. 1, at 24 (1978). The Senate Judiciary Committee was also clear on this point, finding FISA "constitutes the exclusive means by which electronic surveillance ... may be conducted; *the bill recognizes no inherent power of the President in this area spells out that the Executive cannot engage in electronic surveillance within the United*

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surveillance for the reasons stated in section 2511(3) of title 18, United States Code, if 3197, 94th Cong. 2d Sess, § 2528 (Mar. 23, 1976), reprinted in *Hearings on S. 743, S. 1998, S. 3197 Before the Subcomm. On Criminal Laws and Procedures of the Senate Judiciary Comm.*, 94th Cong., 2d Sess. 134 (1976) (stating in the first page of the report that S. 3197 was identical to the measure transmitted to the Senate by the President on March 23, 1976).

[42]That provision stated: "Nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the president in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." Pub.L.No. 90-351, 82 Stat. 212 (codified as amended at 18 U.S.C. §§ 2510-2520 (1968)).

States without a warrant. [FISA] provides ... that its statutory procedures . . . 'shall be the exclusive means' for conducting electronic surveillance . . . . [T]his legislation ends the eight year debate over the meaning of the inherent power disclaimer. S. Rep. No. 95-604, pt. I, at 6 (1978) (emphasis added).[43]

The Conference report – the final and most definitive explanation of Congress' legislative intent – firmly reiterates that Congress intended to occupy the field regarding domestic warrantless surveillance: "*The intent of the conferees is to apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure case: 'When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb*, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter.'" *Joint Explanatory Statement of the Committee of the Conference*, House Conference Rep. No. 95-1720, 35 (Oct. 5, 1978) (emphasis added).[44]

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[43]To eliminate any doubt concerning the legislative intent, the Senate Report concludes that FISA was "designed . . . to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Rep. No. 95-604, pt. I, at 8. When it comes to electronic surveillance covered by FISA, "the Congress has declared that this statute, not any claimed presidential power, controls." *Id*. at 64.

[44]The Report further stated, "[t]he Senate Bill provided that the procedures in this bill and in Chapter 119 of Title 18, United States Code, shall be the exclusive means by which electronic surveillance, as defined in this bill, and the interception of domestic wire and oral communications may be conducted. The House amendments provided that the procedures in this bill and in Chapter 119 of Title 18, U.S.C. shall be the exclusive *statutory* means by which electronic surveillance as defined in this bill and the interception of domestic wire and oral communications may be conducted. The Conference substitute adopts the Senate provision which omits the word "statutory" . . . . The conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court." *Joint Explanatory Statement of the Committee of the Conference*, House Conference Rep. No. 95-1720, 35 (Oct. 5, 1978).

Although the Bush Administration attempts to assert that contemporaneous statements of the Carter Administration indicate their support for warrantless surveillance,[45] the legislative history is also quite clear that the executive branch understood and accepted that the FISA law would occupy the field in this respect. Testifying before the House Intelligence Committee in 1978, Attorney General Griffin Bell stated, "I would particularly call your attention to the improvements in this bill over a similar measure introduced in the last Congress. First, *the current bill recognizes no inherent power of the President to conduct electronic surveillance.* Whereas the bill introduced last year contained an explicit reservation of Presidential power for electronic surveillance within the United States, this bill specifically states that the procedures in the bill are the exclusive means by which electronic surveillance, as defined in the bill, and the interception of domestic wire and oral communications may be conducted." *Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5764, Congressional Hearing on H.R. 9745, H.R. 7308, and H.R. 5632, Before the Subcomm. on Legislation of the H. Comm. on Intelligence*, 95th Cong. (1978) (statement of Attorney General Griffin Bell) (emphasis added).[46]

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[45]The White Paper notes while FISA was being debated during the Carter Administration, Attorney General Griffin Bell testified that "the current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power [of] the President under the Constitution.*" White Paper at 8.

[46]During the House Hearings, John M. Harmon, the Assistant Attorney General, Office of Legal Counsel, admitted that "it seems unreasonable to conclude that Congress, in the exercise of its powers in this area, may not vest in the courts the authority intelligence surveillance." Also, when President Carter signed FISA into law, he specifically acknowledged that the law requires "a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the United States in which communications of U.S. persons might be intercepted." Jimmy Carter, Statement on Signing S.1566 into Law (Oct. 25, 1978), *available at* http://www.cnss.org/Carter.pdf (emphasis in original).

C. NO CASE AUTHORITY AUTHORIZES THE ADMINISTRATION TO BYPASS FISA.

The Bush Administration's reliance on language *In re Sealed Case*, and the three court of appeals decisions noted therein is not persuasive for several reasons. The actual statement in the *In Re Sealed Case* is *dicta* – the issue before the FISA court was whether the new "significant purpose" test for FISA warrants enacted pursuant to the PATRIOT Act complied with the Fourth Amendment, not whether warrantless domestic surveillance was constitutional. 310 F.3d at 717, 746. Also, all three court of appeals decisions cited by the Administration were decided prior to the enactment of the 1978 FISA law and are easily distinguishable. In *Truong*, the court found that pre-FISA, judicial review of warrants of foreign surveillance was not appropriate because of the desire to avoid undue delay, the need for secrecy, the competence of the judiciary, and sensitivity to separation of powers. 629 F.2d at 914. All of these concerns have been addressed and incorporated in the FISA law – emergency surveillance is permitted; the proceedings are secret; special judges have been chosen; and Congress has enacted procedures which balance the separation of powers. In *Butenko,* while the court held that warrantless electronic surveillance of foreign nationals was lawful, it stated that it would be unlawful if the interception were to be conducted on a domestic group for law enforcement purposes. 494 F.2d at 606. In *Brown*, 484 F.2d at 426, the Court also recognized the legality of a challenged warrantless wiretap for the purpose of gathering foreign intelligence, but in so doing partially relied upon since repealed statutory language indicating congressional intent to defer to the President on these matters. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. § 2511(3) (1968) (provision repealed). After reviewing these cases, the non-partisan Congressional Research

Service concluded, "[I]t the wake of FISA's passage, the Court of Review's reliance [in the *In re Sealed Case*] on these pre-FISA cases or cases dealing with pre-FISA surveillance as a basis for its assumption of the continued vitality of the President's inherent authority to authorize the warrantless electronic surveillance for the purpose of gathering foreign intelligence information might be viewed as somewhat undercutting the persuasive force of the Court of Review's statement."[47]

D. FOURTH AMENDMENT

Even if the Administration were able to establish that warrantless domestic surveillance was statutorily or otherwise legally authorized – which is not the case – in order to be constitutional it must also be shown to comply with the Fourth Amendment's warrant requirement (which has been definitively held to apply to electronic surveillance[48]). For its part, the Bush Administration argues that NSA surveillance should be considered reasonable, both under a general "balancing of interests" test under the Fourth Amendment[49] and pursuant to a "special needs" exception to the Fourth Amendment set forth in such cases as *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Sure. Ct. of Rev. 2002), *Vernonia School District 47J v. Acton,* 515 U.S. 646 (1995), and *Michigan Depot of State Police v. Sitz,* 496 U.S. 444 (1990).[50]

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[47]CRS Memo at 32. Moreover, it is important to note that the Fourth pre-FISA circuit court decision to address this decision, *Zweibon v. Mitchell*, firmly rejected the idea of warrantless surveillance. 516 F.2d 594 (D.C. Cir. 1975) (en banc).

[48]The two seminal Supreme Court precedents in this area make it clear that widespread domestic surveillance necessitates a judicially approved warrant. In Katz v. United States, 389 U.S. 347 (1967), the only time the Supreme Court considered the issue of national security wiretaps – the Court held that the Fourth Amendment requires adherence to judicial processes, and searches conducted outside the judicial process, are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. In *United States v. United States District Court* (the Keith case), 407 U.S. 297 (1972), the Court specifically held that, in the case of intelligence gathering involving domestic security surveillance, prior judicial approval was required to satisfy the Fourth Amendment. *Id.* at 313-14, 317, 319-20. The Court stated: "These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch." *Id.* at 317-18.

The Administration's contention the domestic spying program complies with the Fourth Amendment fails for several reasons. First, the cases cited by the Justice Department can be easily distinguished, and all include mitigating factors that are not present in the Bush Administration's warrantless surveillance program. *In re Sealed Case* merely represents the principle that before FISA was enacted, the President had inherent authority to engage in certain foreign intelligence surveillance, since that time, of course, Congress has enacted in the form of FISA an entire statutory framework governing surveillance activities. *See* 310 F.3d 717 (Foreign Intel. Sure. Ct. of Rev. 2002). In *Vernonia*, the Court upheld school drug testing programs because students have diminished expectations of privacy in school, the programs were limited to students engaging in extracurricular programs, and the drug testings were standardized and tested only for the presence of drugs – no factor like this is present with respect to the NSA program. *See* 515 U.S. 646 (1995). Similarly, in *Sitz*, the Court upheld highway drunk driving checkpoints because they were standardized, the stops were brief and minimally intrusive, and a warrant and probable cause requirement were found to defeat the purpose of keeping drunk drivers off the road – again, none of this can be said about the NSA program. *See* 496 U.S. 444 (1990).

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[49]White Paper at 37.

[50]In the context of its Fourth Amendment arguments, the Administration also asserts that the NSA program is needed to allow the executive branch to react "quickly and flexibly." White Paper at 39.

As the letter signed by former FBI Director Sessions, Professor Van Alstyne and other scholars and officials explained:

> the NSA spying program has *none* of the safeguards found critical to upholding "special needs" searches in other contexts. It consists not of a minimally intrusive brief stop on a highway or urine test, but of the wiretapping of private telephone and email communications. It is not standardized, but subject to discretionary targeting under a standard and process that remain secret. Those whose privacy is intruded upon have no notice or choice to opt out of the surveillance. And it is neither limited to the environment of a school nor analogous to a brief stop for a few seconds at a highway checkpoint. Finally, and most importantly, the fact that FISA has been used successfully for almost thirty years demonstrates that a warrant and probably cause regime is *not* impracticable for foreign intelligence surveillance.[51]

Second, the test set forth by the Bush Administration for conducting warrantless surveillance – an NSA determination that there is a "reasonable basis to believe" that a party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda or working in support of al Qaeda." – is inconsistent with the Fourth Amendment's probable cause requirement. Although the Attorney General has attempted to argue that "it's the same standard," *Wartime Executive Power and the NSA's Surveillance Authority (Part I): Hearing before the Senate Judiciary Committee*, 109th Cong. (2006) (testimony of Attorney General Alberto Gonzales), George Washington Law School

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[51] Letter from Laurence H. Tribe, Carl M. Loeb University Professor, Harvard University Law School, to The Honorable John Conyers, Jr. (Jan. 6, 2006). Professor Tribe has written, the wiretapping scheme that the Administration employs is "so indiscriminate and sweeping" in its intrusion into American citizens' private communications that no balancing test can save it from violating those rights protected by the Fourth Amendment to be secure against unreasonable searches and seizures. *Id.* at 2. Professor Tribe argues that this is especially so when the scheme is administered by one branch of government without adequate checks on that power. This applies even when such activity may be a constitutional power entrusted to the President by Article II or delegated to the President by Congress in exercising its powers by Article I.

Professor Jeffrey Rosen has observed, "[I]t's not the same standard: Probable cause is clearly more demanding."[52] Another legal expert, President Bush's Chief of the FBI's national security law unit, Michael J. Woods, explained that this lower legal threshold may be the reason the Administration decided to opt out of FISA to begin with.[53]

Third, and in any event, it does not appear that the surveillance being performed by the NSA can meet even the Administration's lower self-imposed "reasonable basis" standard. According to government sources, and as noted below, the NSA program had little discernible impact on the government's ability to prevent terrorist plots by Al Qaeda.[54] It has been reported by official sources that fewer than ten U.S. persons per year have aroused sufficient suspicion during warrantless surveillance to warrant seeking a full fledged FISA warrant. [55] Accordingly, both national security lawyers working for and outside the Bush Administration have stated that this low "washout" rate made it doubtful the program could pass muster under the Fourth Amendment, because such searches cannot be deemed "reasonable."[56]

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[52]Jeffrey Rosen, *Alberto Gonzales's Spin*, The New Republic Online, Feb. 27, 2006, *available at* http://www.tnr.com/doc.mhtml?i=20060227&s=rosen022706.

[53]Woods has stated that the lower reasonable basis standard "in my mind, is a much more likely reason why they maintained this [surveillance program]." Richard B. Schmitt and David G. Savage, Legal Test Was Seen as Hurdle to Spying; Some Say the Court's Tougher Standard of 'Probable Cause' Led to the Surveillance Order, L.A. TIMES, Dec. 20, 2005, at A1.

[54]Barton Gellman, Dafna Linzer, & Carol D. Leonnig, *Surveillance Net Yields Few Suspects*, WASH. POST, Feb. 5, 2006, at A1.

[55]*Id.*

[56]*Id.*

According to a government lawyer who has closely examined the NSA program, the minimum conceivable definition of "reasonable basis" would require that evidence derived from the eavesdropping would be "right for one out of every two guys at least." [57] This individual stated that the individuals who developed the program "knew they could never meet that standard – that's why they didn't go through" the FISA court. Michael J. Woods, has stated that even the Administration's own "reasonable basis" standard would necessitate, as a constitutional matter, evidence "that would lead a prudent, appropriately experienced person" to believe the American was a terrorist agent, and if the program returned "a large number of false positives, I would have to conclude that the factor is not a sufficiently reliable indicator and thus would carry less (or no) weight.[58]

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[57] *Id.*

[58] *Id.*

CONCLUSION

For the reasons set forth herein, respectfully submit that this Court should grant plaintiffs' motion for partial summary judgment, thereby rendering a judicial finding that the NSA's activity in this regard is contrary to duly enacted congressional legislation as well as the Constitution of the United States.

Respectfully submitted,

/s/
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